

IN THE WEEDS: HEMP PROGRESS SHOWN WITH NEW USDA INTERIM RULE

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Consumer Products Alert

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On October 29, 2019, the U.S. Department of Agriculture (USDA) issued the long-awaited Interim Final Rule (IFR)^[1] to establish the domestic hemp production program, pursuant to the Agriculture Improvement Act of 2018 (commonly referred to as the "Farm Bill"). The IFR was drafted to address the uncertain legal status of hemp production at the federal level, and the USDA concurrently issued its guidelines for hemp sampling and testing^[2] to provide additional guidance.

HEMP DEFINED

Hemp is defined as "the plant species *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." Any cannabis with a THC level exceeding 0.3 percent is considered marijuana, which remains listed as a schedule I controlled substance under the Controlled Substance Act (CSA) regulated by the Drug Enforcement Agency (DEA).

REQUIREMENTS FOR STATE AND TRIBAL PLANS

States or Indian tribes that wish to have primary regulatory authority over hemp production in its territories may submit a plan to the USDA to monitor and regulate the crop. The IFR does not preempt or limit state law that will regulate the production of hemp more stringently, and the USDA will approve or disapprove a plan within 60 days of submission. The plans must include procedures for tracking the land where the hemp is grown, testing for THC concentration levels, and disposing of noncompliant plants.

For testing requirements, the USDA will maintain a list of DEA-approved laboratories that producers must use. Sampling of hemp flower material must be conducted within 15 days before anticipated harvest by a USDA-approved sampling agent. In addition, states may submit alternative sampling and testing protocols for consideration.

To ensure effective disposal of noncompliant plants, states are also required to include procedures that follow CSA and DEA regulations, and such plants must be collected for destruction by a person authorized to handle marijuana (i.e., a DEA-registered reverse distributor, or a duly authorized federal, state, or local law enforcement officer).

While a state or tribal government has a draft hemp production plan pending for USDA approval, the USDA will not issue licenses to individual producers located in those states or territories. If the USDA disapproves a plan,

individual producers located in those states or territories may apply for a hemp production license with the USDA directly and will have to comply with the USDA production plans.

Recognizing that hemp producers may take the necessary steps and precautions yet still produce plants that exceed the acceptable THC level, the USDA will implement a "measurement of uncertainty" in evaluating the test results. Test results for THC concentration will be reported as a percentage plus or minus the margin of error. If 0.3 percent falls within that range, the product will be considered in compliance with the law^[3].

Hemp producers will not be deemed to have committed a negligent violation even if they produce plants that exceed the acceptable THC level, as long as it is determined that they used reasonable efforts to grow the hemp and the plant does not have a THC concentration of more than 0.5 percent. The USDA also allows for states to impose a corrective action plan to such violators, which must include a reasonable date by which the producer will correct the negligent violation. Producers operating under a corrective action plan must also periodically report to the state or tribal government on their compliance for at least two years following the violation.

FEDERAL CROP INSURANCE POTENTIAL

The IFR seeks to provide sufficient time to authorize federal crop insurance coverage to lawful producers of hemp by 2020. Such coverage has the potential to reduce producers' risks and provide them with easier access to capital.

TRANSPORTATION OF HEMP

The IFR also clarifies that states and Indian tribes may no longer prohibit the interstate transport of hemp that has been legally grown under the program.

REGULATION OF SEED

The USDA did not include a seed certification program in the IFR, noting that the same seeds grown in different locations may have different reactions. Additionally, the USDA stated that the technology necessary to determine seed planting results is not advanced enough to make a seed-certification scheme feasible.

FINAL NOTES

The IFR will go through a 60-day, public-comment period ending on December 30, and the 2020 growing season will be used to guide any adjustments. The IFR will expire in two years, by which time the USDA hopes to have final rules in place.

The IFR provides a greater degree of certainty and uniformity to the hemp industry, but due to the anticipated state-by-state differences, stakeholders should still pay careful attention to the developing laws. K&L Gates will continue to monitor and provide updates on further developments in this area. Given our substantive experience in and knowledge of USDA-regulated industries, K&L Gates is well positioned to facilitate engagement and help stakeholders assess regulatory and litigation risks in this area.

We appreciate the contributions of Associate Ashely Song to this alert.

[1] Full text of the IFR available [here](#).

[2] USDA Guidelines for Sampling and Testing available [here](#).

[3] IFR provides examples: "If a laboratory reports a result as 0.35 percent with a measurement of uncertainty of +/- 0.06, the distribution or range is 0.29 percent to 0.41%. Because 0.3 percent is within that distribution or range, the sample, and the lot it represents, is considered hemp for the purpose of compliance with the requirements of State, Tribal, or USDA hemp plans. However, if the measurement of uncertainty for that sample was 0.02 percent, the distribution or range is 0.33 percent to 0.37 percent. Because 0.3 percent or less is not within that distribution or range, the sample is not considered hemp for the purpose of plan compliance, and the lot it represents will be subject to disposal".

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